

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHARLES D. RIEL,

Petitioner,

No. CIV S-01-0507 LKK KJM

vs.

DEATH PENALTY CASE

WARDEN, San Quentin
State Prison,

Respondent.

ORDER

The undersigned held a hearing on June 16, 2010, on petitioner's motions in limine and for discovery. Tivon Schardl, Robert Bacon, and Joan Fisher appeared for petitioner. Paul Bernardino and Heather Gimle appeared for respondent. After considering the parties' briefs and the argument of counsel, and good cause appearing, the court finds and orders as follows.

I. Preliminary Matters

At the beginning of the hearing, the court raised two issues. First, the court stated it would be appropriate to record by audiovisual as well as stenographic means the in-court portion of the evidentiary hearing, to preserve testimony. The parties did not oppose audiovisual recording. Second, the court stated it was willing to revise the scheduling order to permit both in-court and out-of-court testimony to be taken after the currently scheduled August 9, 2010

1 evidentiary hearing date. The parties informed the court they had already been attempting to
2 reach agreement on a proposal for a new schedule, and they have agreed to vacate the August 9
3 hearing date. The court ordered the parties to inform Courtroom Deputy Matt Caspar by Friday,
4 June 18, if they require a hearing on the proposed new schedule. That hearing could be set on the
5 court's June 23 calendar. In addition, the parties were ordered to file any stipulated proposal for
6 a new schedule, or a description of their disagreements, by June 21.

7 II. Motion In Limine

8 Petitioner requested the court address the discovery motion before ruling on the
9 motion in limine. Because petitioner seeks information relevant to the question raised by the
10 motion in limine of whether or not respondent had good cause to identify sixteen of his seventeen
11 witnesses as "rebuttal" witnesses, the court agreed, with one exception. The court will defer
12 ruling on the motion in limine and permit petitioner to supplement that motion after he completes
13 discovery. The court expects the parties to include a date for supplementing the motion in limine
14 in their scheduling proposal.

15 The one issue in the motion in limine that can be resolved now is the admissibility
16 of respondent's witnesses who would testify only to petitioner's post-trial activities. These
17 witnesses are Larry Casner, Gil Polanco, Don Stieper, Marie Rodesillas, Tim Boerum and Naomi
18 Janowitz. Respondent argued that the testimony of these witnesses would be appropriate because
19 petitioner's experts relied upon post-trial examinations, and possibly post-trial facts, to arrive at
20 their conclusions. Respondent's counsel also stated that he intended to cross-examine
21 petitioner's experts about whether certain post-trial factual information would change their
22 conclusions. Then, presumably, if the experts stated that these facts would change their
23 conclusions, respondent would put on witnesses to demonstrate those facts and then question his
24 own expert about them. Even examining this issue in the light most favorable to respondent, this
25 testimony is not admissible. Respondent has insisted that all his lay witnesses who are
26 designated as "rebuttal" should be permitted to testify because they are only "rebuttal."

1 However, as the court described previously, the purpose of rebuttal witnesses is to contradict or
2 impeach an opposing party's witness. The introduction of new facts regarding petitioner's past
3 trial activities would not qualify as rebuttal. Further, petitioner's post-trial activities are not
4 relevant because they would not have been available at trial. Respondent has not shown
5 otherwise.

6 III. Methods For Taking Testimony

7 The court and counsel discussed briefly the methods for taking the testimony of
8 expert witnesses. Because the court has not yet ruled on petitioner's motion to preclude the
9 testimony of respondent's experts Dr. Dunn and Paulette Sutton, it is premature to determine the
10 method for taking each expert witnesses' testimony.

11 IV. Discovery

12 Petitioner has filed a timely motion for leave to conduct discovery. Under Rule 6
13 of the Rules Governing Section 2254 Cases, a party may "invoke the process of discovery
14 available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the
15 case in the exercise of his discretion and for good cause shown grants leave to so do." Good
16 cause exists "where specific allegations before the court show reason to believe that the
17 petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to
18 relief.'" Bracy v. Gramley, 520 U.S. 899, 908-09 (1997) (quoting Harris v. Nelson, 394 U.S. 286,
19 300 (1969)). When this showing has been made, "it is the duty of the court to provide the
20 necessary facilities and procedures for an adequate inquiry." Id.

21 A. All evidence the prosecution would have been required to produce pursuant to
22 Brady v. Maryland and state discovery laws

23 The first category of discovery petitioner seeks involves the evidence the
24 prosecution would have been required to provide to the defense had the witnesses respondent has
25 named here been called to testify at trial. Petitioner divides this discovery into five categories,
26 discussed below.

1 1. All evidence from law enforcement agencies that participated in the
2 investigation or preparation of the case that could be used to support
3 a defense or a sentence less than death.

4 The court finds good cause for discovery of this information. The parties appear
5 to disagree over whether or not respondent should be required to produce documents in the
6 possession of the Kitsap County Sheriff's Office. The court finds good cause for discovery of
7 any documents in the possession of the Kitsap County Sheriff's Office that "could be used to
8 support a defense or a sentence less than death" in this case. However, the court does not assume
9 that respondent in this case has possession, custody or control of those documents. Petitioner
10 may need to seek that discovery directly from the Kitsap County Sheriff's Office and is
11 authorized to do so.

12 2. Impeachment material

13 Respondent does not object to producing impeachment materials. The court finds
14 good cause for petitioner to discover all evidence in the possession, custody, or control of the
15 respondent and that is both material and favorable to the accused.

16 3. Recently recorded witness statements or reports of statements

17 Petitioner argues that because respondent's witnesses could have been introduced
18 at the penalty phase, petitioner is entitled to have the same discovery that the defense would have
19 had at trial if those witnesses had testified, including the substance of statements recently
20 recorded by respondent's counsel. Petitioner's request for discovery of the recorded statements
21 and reports of statements relies on California Penal Code section 1054.1(f). It also is based, in
22 part, on the "tight schedule" that was in place at the time petitioner's motion was filed, and the
23 impossibility of conducting discovery depositions of the witnesses whose statements were
24 recorded. Reply at 9-10. Given the parties' stipulated proposal to vacate the August 9 hearing
25 date, the schedule is no longer so constraining.

26 Respondent argues that the information sought is unnecessary and irrelevant, and
that the request is not appropriately narrow. He adds that the information is protected under the

1 work product doctrine. Petitioner claims respondent's failure to specifically identify how work
2 product protection applies to each responsive document means respondent has essentially waived
3 this objection.

4 As a threshold matter, respondent need not provide a privilege log at this stage of
5 the discovery proceeding. The purpose of the present motion is determining whether or not
6 petitioner has shown good cause for the discovery sought. If the court finds good cause,
7 respondent may interpose specific objections when the discovery is propounded.

8 Section 1054.1(f) is a state court rule of criminal procedure, which requires
9 prosecutors to turn over to the defense "[r]elevant written or recorded statements of witnesses or
10 reports of the statements of witnesses whom the prosecutor intends to call at the trial, including
11 any reports or statements of experts made in conjunction with the case." Section 1054.9,
12 referenced by petitioner at hearing, provides for "reasonable access" to certain materials in
13 postconviction habeas proceedings upon "a showing that good faith efforts to obtain discovery
14 materials from trial counsel were made and were unsuccessful." The materials covered by
15 section 1054.9 are those "in the possession of the prosecution and law enforcement authorities to
16 which the same defendant would have been entitled at time of trial." Section 1054.9 has been
17 interpreted by the California Supreme Court to focus on materials that would have been available
18 at the time of trial. In re Steele, 32 Cal. 4th 682, 697 (2004). The court does not read Steele as
19 authorizing the discovery of materials first developed by a respondent during federal
20 postconviction habeas proceedings, particularly if those materials are not clearly exculpatory.

21 At this stage of proceedings, given the parties' pending stipulation to continue the
22 August 9 hearing date, the pressure associated with preparing for that hearing is reduced. To the
23 extent petitioner's request is directed toward discovering the recorded statements, the request is
24 denied. Petitioner will be allowed to depose the witnesses who provided the statements. With
25 respect to any reports prepared by respondent's counsel in the present case, the reports are not the
26 same as reports or notes of the prosecution in state court. Moreover, nothing in the record before

1 the court establishes that the reports bear a relationship to the question of what information
2 petitioner would have been entitled to had these witnesses been presented in the state court
3 proceeding. Petitioner has not shown good cause for discovery of the reports under sections
4 1054.1(f) and 1054.9.

5 4. Documents re witnesses Phil Colcord and Edwin Hedrick

6 Petitioner seeks background and personnel information regarding former sheriff's
7 deputies Colcord and Hedrick. He has not shown good cause why any personnel records of these
8 life history witnesses would lead to the discovery of relevant evidence. Petitioner compares this
9 current request to the court's prior reliance in this case on Pitchess v. Superior Court, 11 Cal. 3d
10 531 (1974). The current request bears no resemblance to the situation in which this court
11 previously found personnel records discoverable. There, petitioner made supported claims of
12 error in the collection of evidence. In that situation, personnel and training records of the officers
13 involved were likely to lead to the discovery of relevant evidence. See Nov. 18, 2003 Order at 1-
14 5. Petitioner has made no such showing of good cause here to discover the background and
15 personnel records of Mr. Colcord and Mr. Hedrick.

16 5. Pitchess materials regarding witnesses Casner, Stieper, and Polanco

17 As discussed above, the court precludes the testimony of these witnesses.
18 Accordingly, this discovery request is moot.

19 B. Notice of respondent's examination of any member of the trial defense team

20 Petitioner claims he requires this information to comply with this court's directive
21 to "file a brief describing any potential evidentiary hearing testimony he feels should be taken in
22 a closed courtroom and just how that testimony meets the standards set out in Osband." May 17,
23 2010 Order at 4-5. Because petitioner currently has a motion for reconsideration of the May 17
24 Order pending before Judge Karlton, the court will defer a ruling on this request.

25 ////

26 ////

1 C. Depositions and Subpoenas Duces Tecum

2 1. Dr. Dunn

3 a. Undisputed Requests

4 Respondent does not oppose petitioner's request to depose Dr. Dunn. The court
5 finds good cause for that request. Respondent does object to petitioner's request that Dr. Dunn
6 produce certain documents. Respondent agrees to, and the court finds good cause for, Dr.
7 Dunn's production of the following requested documents:

8 i. The diplomas Dr. Dunn received for his masters' and doctoral
9 degrees, including, but not limited to, any certifications of specialization he may have received in
10 counseling psychology.

11 ii. Documents identifying the members of the peer review
12 committee for each publication Dr. Dunn claims was peer-reviewed.

13 iii. Documents related to Dr. Dunn's status as a visiting lecturer at
14 Pepperdine University between 1995 and 1998. Respondent appears to seek to limit this to
15 documents appointing Dr. Dunn to that position. This request is discussed further below.

16 iv. Copies of articles Dr. Dunn published in Claims magazine.

17 v. Copies of all documents and electronically stored information
18 relied upon by Dr. Dunn when forming his opinions that include any notations made on or about
19 those materials, including but not limited to notes, memoranda, e-mail, letters, articles, abstracts
20 and any highlighting, underlining, marginalia, and interlineations that may be used to refresh the
21 witness's recollection during the hearing.

22 vi. Copies of the declaration and CV of Daniel Martell, Ph.D.,
23 which are referred to in Dr. Dunn's list of items he considered in rendering his opinion in this
24 case.

25 /////

26 /////

1 b. Disputed Requests

2 Respondent disputes petitioner's request for the following documents from Dr.

3 Dunn:

4 i. All correspondence between Dr. Dunn and the peer reviewers.

5 Petitioner admitted during the hearing that the issue is whether or not Dr. Dunn's articles were
6 peer reviewed, not the contents of the peer review. Petitioner has not shown good cause for this
7 discovery.

8 ii. Regarding Dr. Dunn's visiting lecturer position at Pepperdine,
9 petitioner seeks "any contract for his teaching or lecturing services during the years 1995 through
10 1998, any catalog of courses listing him as a visiting lecturer or instructor during the years 1995
11 through 1998, and any syllabus he used when teaching the classes referred to in his declaration."
12 Because they relate to Dr. Dunn's status at Pepperdine, the court finds good cause for the
13 discovery of these documents.

14 iii. Petitioner seeks: "Documents reflecting the dates on which Dr.
15 Dunn was retained by Respondent in this case, and the dates on which he received background
16 materials, including any referral letter(s) whether electronic or on paper, and cover letters,
17 e-mails, envelopes or airbills documenting the dates on which Respondent's counsel sent the
18 materials referred to in Paragraph 8 of the declaration dated January 11, 2010 (Doc. 296-2)."
19 Without deciding whether or not respondent properly identified Dr. Dunn as a rebuttal expert, the
20 court will permit petitioner to conduct this discovery regarding whether respondent could have or
21 should have anticipated the need to identify Dr. Dunn previously.

22 2. Robert Maloney

23 Mr. Maloney was the prosecutor at trial. Respondent does not object to, and the
24 court finds good cause for, petitioner's request to take Mr. Maloney's deposition. Respondent
25 objects to petitioner's request for: "Any and all correspondence between Robert Maloney and
26 Respondent's counsel concerning the timing and content of his testimony." Because petitioner

1 seeks this information directly from Mr. Maloney, it is not protected work product. The court
2 finds good cause for its production.

3 While petitioner originally also requested that Mr. Maloney produce the district
4 attorney's files, petitioner agreed that Mr. Maloney need not produce duplicate copies of
5 anything previously provided to petitioner. If there are any documents in Mr. Maloney's
6 possession, custody or control that are responsive to the following request and that have not been
7 disclosed, the court finds good cause for their disclosure now: "Any and all documents in
8 possession of Shasta County District Attorney's Office relating to crime scene photographs,
9 sketches, evidence collection including notes, memoranda, transcripts, recordings or other item
10 which relates to the location of beer cans at Rambo Truck Stop in Weed, California on
11 November 3, 1986 including any memorialization of conversations with members of the Siskiyou
12 County Sheriff's Office including but not limited to Deputy Paul Morey and/or Louis Delgado,
13 Shasta County Sheriff's Office including but not limited to Larry Schaller and/or Detective Larry
14 Jarrett and California Department of Justice, including but not limited to Robert Dolliver."

15 3. Paul Morey

16 Respondent does not oppose petitioner's request to depose Mr. Morey or the
17 production of documents. The court finds good cause for both.

18 4. Paulette Sutton

19 Respondent does not oppose, and the court finds good cause for, petitioner's
20 request to depose Ms. Sutton. The parties appear to have resolved informally any disputes
21 regarding Ms. Sutton's production of documents.

22 D. Third Party Subpoenas Duces Tecum & Request for Production of Documents

23 Respondent objects to these requests generally by arguing petitioner should have
24 brought them earlier. This court's order permitting pre-evidentiary hearing discovery did not
25 limit the subjects of that discovery. Jan. 22, 2010 Order at 2. Respondent also requests
26 "reciprocal discovery." He asks that he be provided copies of all discovery petitioner receives

1 from these requests. Petitioner agrees to provide respondent courtesy copies of any better quality
2 photo images petitioner obtains, as confirmed below, but otherwise objects to respondent's
3 request.

4 Respondent has had the same opportunities petitioner has had to request
5 discovery. He has not done so. To the extent respondent's request contained in his June 10
6 opposition to petitioner's discovery motion can be construed as a discovery motion, it is denied
7 as untimely. See Jan. 22, 2010 Order at 2 ("By June 7, 2010, the parties shall file any
8 discovery-related motions, except motions to compel.").

9 The court finds petitioner has shown good cause to issue subpoenas duces tecum
10 or requests for production of documents for the following information from the following entities
11 or people:

12 1. From the Shasta County Auditor: "Time, billing and payment records related to
13 the work Frank O'Connor and Russell J. Swartz, and any personnel who assisted them, did on
14 Petitioner's case that are in the possession, custody or control of the Shasta County Auditor, and
15 documents reflecting the other case assignments to Frank O'Connor and Russell J. Swartz which
16 were pending at any time during the period commencing November 3, 1986 (date of offense) and
17 October 14, 1988 (date of denial of motion for new trial and sentencing)."

18 2. From the Shasta County Sheriff: "Records and files of the Shasta County Jail
19 reflecting contact between trial defense personnel and Charles D. Riel, John Osborne, and Virgal
20 Edwards including, but not limited to visiting logs, unit logs and movement logs covering the
21 dates November 3, 1986 through October 14, 1988."

22 3. From the Kitsap County, Washington Sheriff: "Any and all police reports
23 related to Al Riel, Petitioner's father."

24 4. From respondent: "As to any witness Respondent may call to testify or from
25 whom Respondent may attempt to present direct testimony, including any declarants, Petitioner

26 /////

1 requests production of any and all writings that may have been or may be relied by the witness to
2 refresh the witness's recollection."

3 5. From the appropriate party: "Either the original negatives or high resolution
4 scans (2000 x 3000) of the negatives of each and every photograph taken at the scene where
5 Edward Middleton's body was found, and either the original negative or high resolution scans
6 (2000 x 3000) of each and every photograph of Petitioner's clothing, the victim, and the victim's
7 clothing." The court notes that respondent does not object to this discovery. In addition,
8 petitioner's counsel agreed that respondent's counsel should also be provided copies of these
9 negatives or scans.

10 E. Interrogatories

11 Respondent interposes objections to each interrogatory. However, most are
12 general statements that the interrogatory infringes on work product or "invades the province of
13 this Court." Contention interrogatories are appropriate and the work product objection is not
14 well taken.

15 Before 1970, the courts consistently held that the work product
16 concept furnished no shield against discovery, by interrogatories or
17 by deposition, of the facts that the adverse party's lawyer has
18 learned, or the persons from whom he or she had learned such
19 facts, or the existence or nonexistence of documents, even though
20 the documents themselves may not be subject to discovery. This
21 has continued to be true under Rule 26(b)(3).

22 8 Wright, Miller & Marcus, Fed. Prac. & Proc. Civ. § 2023 (3rd ed.) (notes omitted). The court
23 finds good cause for petitioner to propound the interrogatories attached as exhibit D to his
24 discovery motion.

25 Accordingly, and good cause appearing, IT IS HEREBY ORDERED as follows:

26 1. By June 18, 2010, the parties shall inform Courtroom Deputy Matt Caspar if
they require a hearing regarding proposed revisions to the scheduling order. By June 21, the
parties shall file any stipulated proposal, or a description of their disagreements, for a new
schedule.

1 2. A ruling on petitioner's May 19, 2010 Motion in Limine is deferred in all
2 respects but one. Petitioner's motion is granted with respect to evidence of post-trial events. The
3 testimony of respondent's proposed witnesses Larry Casner, Gil Polanco, Don T. Stieper, Marie
4 Rodesillas, Tim Boerum and Naomi Janowitz is precluded at the evidentiary hearing.

5 3. Petitioner's May 28, 2010 motion for discovery is granted in part and denied in
6 part as set forth above.

7 4. The court will determine the methods for taking the testimony of each party's
8 experts after resolution of petitioner's motion in limine.

9 DATED: June 18, 2010.

10
11 
12 U.S. MAGISTRATE JUDGE
13
14
15
16
17
18
19
20
21
22
23
24
25
26

riel